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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1958

No. 215

UNITED STATES OF AMERICA,

Respondent-Appellee,

—v.—

SAMUEL GOLDSTEIN,

Petitioner-Appellant.

PETITIONER'S REPLY BRIEF

ARTHUR D. GOLDSTEIN,
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New York, N. Y.

IN THE

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UNITED STATES OF AMERICA,
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—v.—

SAMUEL GOLDSTEIN,
Petitioner-Appellant.

PETITIONER'S REPLY BRIEF

Preliminary Statement

Sixty days have elapsed since the filing of the petition for certiorari herein. The Respondent requested and secured a thirty day extension for filing its Brief herein. In the intervening time, the cases which have been added to this Court's docket underline the importance of the issues presented in this and the other cases to be hereinafter mentioned and the desirability of granting certiorari in all of them so that there can be an orderly resolution of the issues presented and the principles which the cases present.

I.

Cases Now Pending on This Court's Docket.

American National Bank of Jacksonville v. United States, No. 261. Certiorari to the Fifth Circuit, case below, 255 F. 2d 504. The Court is afforded an opportunity of resolving the same issue which was presented in *United*

States v. R. F. Ball Construction Co., 355 U. S. 587. The Respondent thought the issue in *Ball* was so simple that it requested granting of certiorari and reversal without the filing of Briefs or argument. While the Court decided *Ball, per curiam*, there were four dissents. In No. 261, the Petitioner specifically raises the issue of *Erie R. Co. v. Tompkins*, 304 U. S. 64, and the result may now be very different than the scope of the issues which this Court, under its rules, was permitted to investigate and determine under the *Ball* petition. In addition, No. 261 shows a case where the Respondent has lost on its contentions that a Federal Tax Lien against a husband attaches to real property held by the husband and wife as tenants by the entirety. It is most significant that the Respondent did not choose to file a cross-petition in No. 261 but advanced the remarkable contention in its Brief in Opposition that certiorari should be denied in that case since its contentions with respect to the tenancy by the entirety should have been sustained by the Fifth Circuit. The instant case captioned above likewise raises the applicability of *Erie R. Co. v. Tompkins*.

Aquilino v. United States, No. 132, and *United States v. Hulley*, No. 300, both present questions of the applicability of State or Federal law in determining the property right which is subject to a Federal Tax Lien. No. 132 is from the Court of Appeals of the State of New York (3 N. Y. 2d 511), and the most significant point to be mentioned with respect to the Respondent's Brief in that case is that he contends that the determination was made pursuant to State law whereas the Respondent's argument to the Court of Appeals was that only Federal law controlled. (See Official Reporter's summary, 3 N. Y. 2d at 54-513.) That the New York Court of Appeals would probably now reach a different result in *Aquilino*, No. 132, because of this Court's decisions in *Commissioner v. Stern*, 357 U. S. 39 and *United States v. Bess*, 357 U. S. 51, see *United States v. Aetna Casualty & Surety Co.*, 4 N. Y. 2d 639; it

is most significant that the Respondent herein has not chosen to seek review of *Aetna*. The decision in that case is cited to this Court in both the *Aquilino* petition and also in the petition in *American National Bank of Jacksonville*, No. 261.

Directly contrary to *Aquilino* is *United States* v. *Hulley*, No. 300, certiorari to the Florida Supreme Court, 102 So. 2d 599. There the Florida Court applies State law. This Court's attention is invited to the inconsistency of the argument of the Respondent herein in its Brief in Opposition in No. 132 as contrasted with its petition for certiorari in No. 300.

DuBois, Trustee of Cherry Valley Homes, Inc. v. *United States*, No. 304, certiorari to the Third Circuit 255 F. 2d 706. Whether the claim of a creditor against a bankrupt, which was only a general claim under the bankruptcy law, was promoted to priority status because the bankrupt's creditor happened to be a delinquent Federal taxpayer, and the claim against the bankrupt was levied upon for the creditor's taxes. It is, of course, well known that Revised Statutes, § 3466, directly construed by the Third Circuit in the *Cherry Valley Homes* case is a thread common to all Federal Tax Lien cases since the provisions of R. S. § 3466 have been frequently relied upon by this Court in the determination of tax liens in non-bankruptcy cases. (See the 1956 *Report of the Committee on Relative Priority of Government and Private Liens*, Real Property Section, American Bar Association, at pages 128-129 of the 1956 Proceedings of that Section.)

Sims v. *United States*, No. 88, certiorari to the Fourth Circuit, — F. 2d — (as yet unreported, 1958-2 CCH USTC paragraph 9269). Whether the West Virginia State Auditor can be held personally liable for a penalty in excess of the penalty provided by State law for failing to honor a Federal tax levy against a State employee's wages where the employee was a tax delinquent. While not citing

Erie R. Co. v. *Tompkins*, *supra*, we submit that the case fairly presents an issue as to whether State or Federal law governs the extent of the liability of a debtor where the property right has been garnished for application to an unpaid Federal tax of the creditor.

We submit that all of the foregoing cases involve principles common to the instant case and to each other. That the orderly administration of justice requires the grant of certiorari in all of them so that the issues can be considered and decided together.

II.

Significant Cases Which the Respondent Has Not Chosen to Appeal.

Just as this Court substantially rejected all of the government's contentions in *Commissioner* v. *Stern* and *United States* v. *Bess*, *supra*, the government has suffered other very significant defeats in the State Courts and in the Circuit Courts of Appeal. By failing to appeal to this Court for the ultimate resolution of the issues involved, the government has enlarged a growing area of uncertainly of applicable principles in the field of Federal liens.

United States v. *Aetna Casualty & Surety Co.*, 4 N. Y. 2d 639, was previously mentioned in connection with *Aquilino*, No. 132, *supra*. The New York Court of Appeals holds that State law controls in the determination of the property right which can be subjected to a Federal lien, in that case as in the instant case, a Federal Tax Lien.

Directly contrary to the instant case herein and specifically involving an attorney's lien is *Matter of City of New York (Washington Square Slum Clearance)* [*United States* v. *Coblentz*], 4 A.D. 2d 869 (10) leave to appeal to the Court of Appeals granted, 4 A. D. 2d 947 (23).

United States v. Durham Lumber Co., Fourth Circuit. F. 2d (unreported, see CCH 58-2 USTC paragraph 9736). The Fourth Circuit takes an identical state of facts as is presented to this Court in *Aquilino*, No. 132, disagrees with the reasoning of the New York Court of Appeals, and holds that State law governs under this Court's decisions in *Sterne* and *Boss*, *supra*. The *Durham* case is referred to but without citation or analysis in the Reply Brief filed in this Court in *American National Bank of Jacksonville*, No. 261.

CONCLUSION

We submit that the foregoing shows that the issues presented in the instant case and in the other cases now pending on this Court's docket presents substantial issues which should be authoritatively settled by this Court. We submit that certiorari should be granted herein.

Respectfully submitted.

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SUPREME COURT U S

IN THE

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October Term, 1958

No. 215

UNITED STATES OF AMERICA,

Respondent,

against

SAMUEL GOLDSTEIN,

Petitioner.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME

AND

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

Motion

Petitioner respectfully moves for leave to file, out of time, the annexed petition for rehearing of the order of this Court (358 U. S. 830) entered October 13, 1958. This motion and the annexed petition are based on the following grounds:

1. Subsequent to the denial of the petition for certiorari herein, the Court of Appeals of the State of New York in an almost exactly identical case arising at the same time, in the same Court, out of attorneys' services rendered in the same proceedings; reached an exactly opposite conclusion than the United States Court of Appeals for the Second Circuit did in the instant case. *In the matter of acquiring title, Re: Washington Square Slum Clearance, Borough of Manhattan, City of New York; Coblentz* v.

United States, et al., — N. Y. 2d — (March 5, 1959) while the majority was able to find matters to distinguish that case from this, the minority opinion correctly stated that:

> "The Pay-O-Matic case, also involving priority between an attorney's lien on a condemnation award and a federal tax lien, is indistinguishable from the case before us."

The conflict of other decisions with the Circuit Court's decision herein, discussed in the petition for certiorari herein, is now amplified with this starkly direct and irreconcilable decision by the New York State Court of Appeals. Both the *Coblentz* case, *supra*, and the instant case presents the identical question. We submit that the careful study made by the New York Court and the considerable length, as well as the soundness of its opinion, is further evidence of the importance of this basic question, and hence constitutes supervening action of substantial and controlling effect, which warrants this Court in reconsidering the denial of certiorari in the interests of substantial justice and uniformity of the law.

2. Further, after the denial of certiorari herein, and on February 25th this Court granted certiorari in No. 432—*Aquilino* v. *United States* and No. 579—*United States* v. *Durham Lumber Co.* Both cases present the same general question as that presented in the instant case: That is, whether federal or state law is to be applied in determining the nature of the interest one has in any property where the Federal Government asserts a lien. We submit that if a proper determination is to be had of the general question, certiorari should be granted in this case.

3. This Court has recently handed down two decisions, *Rogers* v. *Calumet National Bank of Hammond* (No. 468) and *Hermann* v. *Rogers* (No. 572) in which it summarily overruled like contentions of the Government therein and is in irreconcilable conflict with the Circuit Court's decision herein.

Jurisdiction

The jurisdiction of this Court to entertain the petition for certiorari was not denied by the respondent's brief in opposition thereto. It is the consistent practice of this Court to reconsider denials of certiorari in the light of subsequently arising conflict and grant certiorari. *Stone* v. *White*, 300 U. S. 643; *Clark* v. *Manufacturers Trust Co.*, 337 U. S. 953, 338 U. S. 241, 242; *Zap* v. *United States*, 330 U. S. 800; *Land* v. *Dollar*, 341 U. S. 737; *United States* v. *Ohio Power Co.*, 353 U. S. 98; *Goldbaum* v. *United States*, 347 U. S. 1007; *Banks* v. *United States*, 347 U. S. 1007; *McFee* v. *United States*, 347 U. S. 1007; *Friedberg* v. *United States*, 347 U. S. 1006.

Prayer for Relief

Wherefore, petitioner prays that this motion be granted, that the annexed petition for rehearing be granted and that on such rehearing that the order denying the petition for certiorari be vacated and such petition be granted and the judgment appealed from be reversed, and for such other and further relief as this Court may deem just and proper.

Dated: New York, N. Y.,
March 31, 1959.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1958

No. 215

UNITED STATES OF AMERICA,

Respondent,

against

SAMUEL GOLDSTEIN,

Petitioner.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

Petitioner prays that this Court grant a rehearing of its order of October 13, 1958 (358 U. S. 830) denying certiorari herein and pray that the writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above entitled cause as prayed for in the petition filed July 24, 1958.

Reasons for Granting Rehearing and Issuing the Writ

1. At the time this Court's order was entered, as set forth in the preceding paragraph, the conflict in the decisions of the various Courts was not as apparent as it is now. The recent decision in *In the matter of acquiring title, re: Washington Square Slum Clearance, Borough of Manhattan, City of New York, Coblentz v. United States*, — N. Y. 2d — (March 5, 1959) is in direct and irreconcilable conflict with the decision herein of the Court of Appeals for the Second Circuit.

2. Essentially the main question raised here was answered negatively in the Court below and is now answered affirmatively in the *Coblentz* case, *supra*. The question raised is if state law (or federal law) controls in determining the interests owned in a state created cause of action when the United States has a tax lien on that cause of action. Secondly asked, is whether it is state (or federal) law that controls in determining the property status of each interested party in relation to the cause of action.

3. The same general question raised in the instant case is being presented in two cases where this Court has granted certiorari—*United States* v. *Aquilino* No. 132 and *United States* v. *Durham Lumber Co.* No. 579. They too question whether it is state (or federal) law that controls in determining the interests in property where the Federal Government claims a lien against a property. More specifically, that case asks whether state (or federal) law determines the interests of a mechanic or materialman in property constructed by them for a delinquent taxpayer when the Federal Government asserts a tax lien.

4. The stark conflict between the decision in this case and the *Coblentz* case, *supra*, is borne up when the Court considers that both that case and this case arose in and before the same Court, the Supreme Court of the State of New York, New York County, Special Term Part VIII on motions to fix attorneys' fees made at approximately the same time; that the attorneys' fees were earned in the same condemnation proceeding; that the material provisions in issue in the written retainer agreements are the same. That case was directly appealed up through the New York Courts. The instant case was enjoined when in the State Court by a Federal Court, and reinstituted as this action in the Federal Court.

The government pressed the similarity between the two cases in the New York Court of Appeals. (Gov't's Brief, p. 15) as authority for reversing the lower Courts therein.

It stated that the facts in the two cases are almost identical. Instead, the Court of Appeals attempted to distinguish the two cases instead of admitting that the Circuit Court's decision herein is wrong. We suggest that the minority opinion is correct insofar as it comments that:

> "The Pay-O-Matic case, also involving priority between an attorneys' lien on a condemnation award and a federal tax lien, is indistinguishable from the case before us."

5. We submit that this Court can consider this case along with the *Aquilino* and *Durham Lumber Cases*, Nos. 130 and 579 without taxing the Court's time and energy too much more than if certiorari had not been granted. Additionally, granting certiorari will somewhat broaden the scope of the review of the very important question already before it. And it would be fairer to keep this case alive, and apply to petitioner the benefit of a favorable determination, if such is made in the other cases. Justice would not be served otherwise, if petitioner could do nothing despite a favorable determination by this Court.

Favorable action by this Court is anticipated by virtue of the recent decisions in *Rogers* v. *Calumet National Bank of Hammond* (No. 468) and in *Herimann* v. *Rogers* (No. 572). There this Court unanimously applied state property law summarily overruling the contentions of the Government in a manner which is in irreconcilable conflict with the Circuit Court's decision herein. It would be unfortunate for the Circuit Court's decision in the instant case to stand, for procedural, rather than substantive reasons.

6. For the reasons given above, reconsideration is also called for in *American National Bank of Jacksonville* (No. 261) and in *Hully* (No. 300). We are informed that application, therefore, will soon be made in the former. A decision in *Aquilino* (No. 130) and *Durham Lumber Co.* (No. 579) can be determinative of these two.